Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

D.L.S., INC., d/b/a DIAMONDS AND LACE SHOWBAR, a Tennessee corporation; ANN MARTIN; KIM TYNDALL; and KAREN CHADWICK,
Petitioners,

v.

CITY OF CHATTANOOGA, TENNESSEE; and TENNESSEE ATTORNEY GENERAL CHARLES W. BURSON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY DETERMINED THAT THE CHATTANOOGA CITY ORDINANCES REGULATING PUBLIC NUDITY COMPLIED WITH THE FIRST AMENDMENT CONTENT NEUTRAL TESTS IN BARNES AND THE RATIONAL BASIS TEST REQUIRED BY THE FOURTEENTH AMENDMENT?

2. WHETHER THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY DISMISSED THE CHATTANOOGA PETITIONERS' CASE ON THE MERITS IN LIGHT OF THE FAILURE OF THE CHATTANOOGA PETITIONERS TO RESPOND TO THE PENDING MOTION TO DISMISS BY THE CHATTANOOGA RESPONDENTS?

3. WHETHER THE PASSAGE OF THE STATE LAW ON PUBLIC INDECENCY, CHAPTER 542, EFFECTIVELY PREEMPTED LOCAL ORDINANCES AGAINST PUBLIC NUDITY?

LIST OF ALL PARTIES TO THE PROCEEDING & CORPORATE DISCLOSURE STATEMENT

The caption of the case contains the names of all the parties involved in this matter.

The City of Chattanooga is a municipal corporation and has no parent companies or non-wholly owned subsidiaries required to be disclosed under Supreme Court Rule 29.6.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was not recommended for full-text publication but was styled: *In re: State of Tennessee Public Indecency Statute. Deja Vu, et al. v. Metropolitan Government of Nashville, et al.*, a copy of which is attached as Appendix 1 to the Brief of Petitioners, DLS, Inc., et al. Respondent City of Chattanooga adopts and incorporates the citations of the official and unofficial reports set forth in the Petition for Writ of Certiorari filed by Petitioner, DLS, Inc.

STATEMENT OF JURISDICTION

Respondent, City of Chattanooga, adopts and incorporates the Statements of Jurisdiction set forth in the Petition for Writ of Certiorari filed by Petitioner, DLS, Inc.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

Respondent City of Chattanooga adopts and incorporates the Constitutional provisions, treaties, statutes, ordinances and regulations involved set forth in the Petition for Writ of Certiorari filed by Petitioner, DLS, Inc.

STATEMENT OF THE CASE

This Respondent adopts the Statement of the Case set forth in the Response Brief of Tennessee Attorney General, Paul Summers, regarding the general procedural history of this case applicable to all parties in the Multi-District Litigation. However, this Respondent will address the procedural history of the Chattanooga case not previously

referenced by Attorney General Summers.

The Chattanooga action originally began in the Eastern District of Tennessee before the Honorable R. Allan Edgar, District Judge, as a Complaint for Temporary Injunction, Permanent Injunction, Damages and Declaratory Judgment filed by the Petitioners on September 27, 1995. At the time the complaint was filed, the Petitioners also filed a Motion for Immediate Transfer pursuant to 28 U.S.C. § 1407(a) to Multi-District Litigation pending the Middle District of Tennessee in Docket No. 1031 as a tag-a-long case. The Chattanooga case principally involved questions as to Chattanooga City Ordinance §§ 25-85, 11-434 and 11-435 but did not contain some questions relative to T.C.A. § 39-13-511 which was at issue in the Middle District of Tennessee. Judge R. Allan Edgar immediately scheduled a hearing on Petitioners' motion for issuance of a temporary restraining order and preliminary injunction on September 29, 1995. Both parties filed briefs and were heard in oral argument concerning the issuance of a temporary restraining order and preliminary injunction before Judge R. Allan Edgar on October 6, 1995. An Order and Memorandum was subsequently issued by Judge Edgar on October 12, 1995, denying in part and granting in part Petitioners' motion for preliminary injunction as to the Chattanooga City Ordinance provisions at issue. Judge Edgar further entered a Memorandum and Order on October 12, 1995, denying Petitioners' motion for an immediate transfer for administrative purposes, but indicating that the portion of the case with common issues of law and fact with other cases questioning T.C.A. § 39-13-511 should be transferred to the Middle District of Tennessee if accomplished by an Order of the Judicial Panel on Multi-District Litigation under 28 U.S.C. § 1407.

On December 5, 1995, an Agreed Order of dismissal as to Police Chief Ralph H. Cothran was entered. An answer of the defendant City of Chattanooga was filed on December 21, 1995. A motion to dismiss defendants Gene Roberts, City Council of Chattanooga, Mai Bell Hurley, Don Eaves, David Crockett, David Distefano, Yusuf Hakeem, John Lively, Leamon Pierce, Marti Rutherford, Ron Swafford, Randall Nelson and Ervin Dinsmore was also filed on December 21, 1995. The Judicial Panel on Multi-District Litigation entered a "Conditional Transfer Order" on December 21, 1995. The City opposed the "Conditional Transfer Order" insofar as the order included all claims of Petitioners including the constitutionality of the Chattanooga City Ordinance provisions and filed a Notice of Partial Opposition to the Conditional Transfer Order to be vacated on January 18, 1996.

A Memorandum and Order was then issued by Judge R. Allan Edgar granting the dismissal of defendants, Gene Roberts, all members of the Chattanooga City Council, Randall Nelson and Ervin Dinsmore on January 29, 1996. Following the dismissal of all defendants other than the City of Chattanooga and Charles W. Burson, then Tennessee Attorney General, a notice of Scheduling Conference was entered by Judge R. Allan Edgar on January 30, 1996, to discuss any further litigation in this case, Case No. 1:95-CV-333 in the Eastern District of Tennessee at Chattanooga.

Prior to the Scheduling Conference in this case, the remaining Chattanooga Respondent again moved the Eastern District Court to dismiss this action on March 6, 1996, pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure in that State judicial proceedings, concerning civil citations to Ann Martin and Renita Henegar pursuant to Chattanooga City Code Section 25-85 were being litigated in the Tennessee State Courts. All Chattanooga

Respondents respectfully moved Judge R. Allan Edgar to dismiss the complaint for the failure to state a claim upon which relief could be granted and upon *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) abstention grounds due to pending Tennessee State Court action involving the Chattanooga City Ordinances in question. Oral argument was eventually heard by the Judicial Panel on Multi-District Litigation concerning the objections of the City of Chattanooga to the transfer of the Chattanooga Ordinance provisions to the Middle District of Tennessee on March 28, 1996. On April 11, 1996, a transfer order was finally issued in Multi-District Litigation Docket No. 1031 transferring *DLS, Inc. v. City of Chattanooga, et al.*, E.D. Tenn., Case No. 1:95-CV-333, to the Middle District of Tennessee and assigning it to the Honorable Robert L. Echols for inclusion in the coordinated or consolidated pretrial proceedings occurring in that Multi-District Litigation case.

Following the ruling of the Judicial Panel on Multi-District Litigation, a Memorandum and Order was entered by Judge R. Allan Edgar on May 17, 1996, denying any reconsideration of its previous orders dated October 12, 1995, due to its lack of jurisdiction. Following the transfer to the Middle District of Tennessee by the Judicial Panel on Multi-District Litigation, the Chattanooga plaintiffs/appellants did not respond to the pending Motion to Dismiss by the remaining Chattanooga defendant. The only filing by the Chattanooga Petitioners in the Middle District prior to September 30, 1996, was a Motion for Status Conference/Case Management Conference on June 17, 1996. There were no legal defenses submitted by the Chattanooga Petitioners in the Middle District concerning the pending motion to dismiss the City of Chattanooga or in any way discussing the constitutionality of Chattanooga City Ordinance upon which the complaint was based.

At the time of transfer, all discovery, briefing and oral arguments of the three other cases in this Multi-District Litigation were completed and pending for consideration by Judge Echols as indicated in the Statement of the Case by Attorney General Walkup. An Order was entered in the Middle District by Judge Echols on July 30, 1996, granting the Chattanooga Petitioners' motion for status conference/case management conference and initially set it on August 26, 1996. A subsequent Order dated August 16, 1996, rescheduled the case management conference until September 30,1996 and a subsequent Order rescheduled any conference until October 21, 1996. Prior to the date scheduled for the case management conference on October 21, 1996, a Memorandum and Order granting Summary Judgment as to all Respondent on the constitutionality of T.C.A. § 39-13-511 and the Chattanooga Ordinances was entered by Judge Echols on September 30, 1996. The Chattanooga Petitioners then filed a "Motion to Reconsider and Motion for Stay Pending Appeal on October 9, 1996. Judge Echols entered a Memorandum and Order denying this Motion to Reconsider on July 2, 1997, but granted a motion for stay which affected all pending State Court action until the resolution of this appeal. The Chattanooga Petitioners filed their Notice of Appeal to the Sixth Circuit Court of Appeals on July 11, 1997.

The U.S. Court of Appeals for the Sixth Circuit consolidated all four cases on appeal from *MDL-1031* and issued an unreported opinion affirming the dismissal of all Petitioners' claims by the District Judge on January 13, 1999. The Petitioners then filed a petition for rehearing with suggestion for rehearing en banc in the Sixth Circuit. The petition was considered and subsequently denied by the Sixth Circuit on March 18, 1999.

This brief in response to the Petition for Writ of Certiorari is filed in accordance with the amended briefing schedule of this Court and is timely filed.

ARGUMENT - REASONS FOR DENYING THE WRIT

1. THE SIXTH CIRCUIT CORRECTLY DETERMINED THAT THE CHATTANOOGA CITY ORDINANCES REGULATING PUBLIC NUDITY COMPLIED WITH THE FIRST AMENDMENT CONTENT NEUTRAL TESTS IN *BARNES* AND THE RATIONAL BASIS TEST OF THE FOURTEENTH AMENDMENT.

A. THIS RULING PROPERLY DISMISSED PETITIONERS' CLAIMS AND DID NOT RESULT FROM ANY FRACTURED READING OF THE PLURALITY OPINION IN *BARNES*.

The Chattanooga Petitioners originally filed a Motion for Issuance of Temporary Restraining Order and Preliminary Injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure which was promptly considered by Judge Edgar in a hearing on October 6, 1995. The Chattanooga Petitioners originally moved the District Court to restrain and enjoin all Respondent in this cause, including the City of Chattanooga, from enforcing or attempting to enforce Chattanooga City Code Sections 25-84, 25-85, 11-434(j)(1) and (2), 11-435(c), and Tennessee Code Annotated Section 39-13-511. Chattanooga City Code Section 25-84 was adopted by the Chattanooga City Commission by reference through Ordinance No. 8727 on November 18, 1986. Chattanooga City Code Section 25-85 was adopted by the Chattanooga

City Commission as Ordinance No. 7420 on September 5, 1978. Chattanooga City Code Sections 11-434(j)(1) and (2), and 11-435(c) were adopted by the Chattanooga City Commission as a portion of Ordinance No. 8601 on March 4, 1986. T.C.A. 39-13-511 was adopted by the Tennessee General Assembly as Public Chapter 542 of the Public Acts of 1994 and became effective on July 1, 1994. (hereinafter "Public Chapter 542"). All City of Chattanooga Ordinances questioned by Petitioners in the complaint are attached as Appendix 1, 2 and 3.

These Chattanooga City Ordinances considered by the District Court did not attempt to regulate in any manner the content of materials available to be sold within the City of Chattanooga. They did, however, set forth specific requirements upon owners, operators, and employees of such businesses which prohibited total nudity and certain other sexual activity in such establishments which had been proven to exist in previous cases in the Eastern District, namely *Broadway Books v. Roberts*, 642 F. Supp. 486, 491 (E.D. Tenn. 1986); and *DLS, Inc. v. City of Chattanooga*, 894 F.Supp. 1140, 1145-1146 (E.D. Tenn. 1995). The City of Chattanooga asserted during oral argument that this conduct within business establishments constituted a significant hazard to the health, welfare, morals and safety of the citizens of the City of Chattanooga for which a city has power to regulate under the police power given to it in its Charter by the State of Tennessee.

1. Chattanooga Legislative History

Under Tennessee State law and the Chattanooga City Code, law enforcement personnel have been specifically authorized to regulate total nudity in public places through a number of laws. Chattanooga City Code Sec. 25-84 is

verbatim to the former language contained in T.C.A. § 39-2-614(a) and T.C.A. §39-13-511 prior to its most recent amendments in Public Chapter 542 in 1994. That Ordinance which was amended last in 1986 provides in pertinent part as follows:

"Sec. 25-84 Indecent Exposure.

> It shall be unlawful for any person in the City in a public place to engage in the willful and intentional exposure of such persons genitals or buttocks to one (1) or more other persons where the exposing person may reasonably expect his conduct to be viewed by another for the purpose of sexual arousal, gratification or offending the viewing person."

The City of Chattanooga also previously enacted Section 25-85, Chattanooga City Code, Part II, last amended in 1978, which provides in pertinent part as follows:

> **"Sec. 25-85. Lewd and indecent conduct.**
>
> (a) Definitions. As used in this section, the following terms shall have the meanings indicated:
>
> Public place shall include: streets, sidewalks or highways; transportation facilities; schools; places of amusements; parks; playgrounds; restaurants; nightclubs; cocktail lounges; burlesque houses; bars; cabarets; taverns; taprooms; private fraternal, social, golf or country clubs; or any place that allows the consumption of intoxicating

beverages on the premises.

Wholly or substantially exposed to public view, as it pertains to breasts, shall mean the showing of the female breast, in a public place, with less than a fully opaque covering of any portion of the breast below the top of the nipple.

(b) Prohibited acts. It shall be unlawful for any person to perform in a public place, or for any person who owns or operates premises constituting a public place to knowingly permit or allow to be performed therein, any of the following acts or conduct:

(1) The performance of acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;

(2) The actual or simulated touching, caressing or fondling of the breasts, buttocks, anus or genitals in public; or

(3) The actual or simulated public displaying of the pubic hair, anus, vulva or genitals;

(4) The appearance by any female in a public place so costumed or dressed that one or both breasts are wholly or substantially exposed to public view, or any owner or operator of premises constituting a public place

knowingly permitting or allowing any such person to appear on the premises owned or operated by him."

Section 25-85 was originally adopted by the City of Chattanooga as Ordinance No. 6946 on September 23, 1975. This Ordinance entitled "Lewd and Indecent Conduct" had its origins in the Indiana public indecency statute which was later found to be constitutional by this Court in *Barnes v. Glen Theatre*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Section 25-85 was subsequently revised by the Chattanooga Board of Commissioners in Ordinance No. 7420, dated September 5, 1978, after litigation in the Tennessee Court of Appeals, to exclude any reference to "theaters" or "auditoriums" within the definition of "public place" which was originally included in Ordinance No. 6946.

The Tennessee General Assembly also substantially revised the statutory language of T.C.A. 39-13-511 through Public Chapter 542 in the summer of 1994 to specifically incorporate most of the minimal pastie and g-string language approved by this Court in *Barnes*. That statute was already being construed in the Middle District of Tennessee by District Judge Robert Echols in the case of *Deja Vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*, Case No. 3 : 94-0494 when this action was originally filed in the Eastern District of Tennessee. The current determination of the constitutionality of Public Chapter 542 is also before this Court as a part of the ruling of the Sixth Circuit below.

The District Court for the Eastern District of Tennessee was also fully familiar with the history of Ordinance No. 8601 and its subsequent amendments which were most recently interpreted by it during litigation during

the spring and summer of 1995, in *DLS, Inc., et al. v. City of Chattanooga, et al.*, 894 F. Supp. 1140 (E.D. Tenn. 1995); and *DLS, Inc., et al. v. City of Chattanooga, et al.*, 914 F. Supp. 193 (E.D. Tenn. 1995). The opinion of Judge Edgar in the initial DLS case was upheld by a panel of the Sixth Circuit in *DLS, Inc. et al. v. City of Chattanooga, et al.*, 107 F.3d 403 (6th Cir. 1997) and no Petition for Writ of Certiorari was sought based upon that case.

The Chattanooga Adult Oriented Establishment Ordinance, codified as Chattanooga City Code § 11-421, et seq., was originally enacted in 1986 by the City of Chattanooga based upon known increases in the cases of Acquired Immune Deficiency Syndrome (AIDS) within the State of Tennessee and after inspection by members of the Chattanooga Police Department, representatives of the Chattanooga news media, and Chattanooga Building and Health Inspectors discovered blood, semen, and urine in the cubicles and booth areas within numerous adult-oriented establishments where persons viewed adult-oriented films or witnessed sexually-explicit live entertainment.

This matter came to the attention of the public and the Chattanooga Board of Commissioners due to reports of "glory holes" which were located in booths within Chattanooga adult-oriented establishments at that time, and through observations of homogeneous and heterogeneous masturbatory acts and other sexual acts, including oral sex acts, which were being performed in such establishments at that time. The Board of Commissioners of the City of Chattanooga, based upon such information, originally deemed it necessary to institute a licensing ordinance to protect the public from the spread of disease as a result of sexual contact in Chattanooga adult-oriented establishments and to prohibit unlawful acts from being performed within public establishments located

within the City of Chattanooga, Tennessee. The original Chattanooga Ordinance was constitutionally approved by District Judge Edgar in 1986 except for certain provisions specified in *Broadway Books v. Roberts, supra,* which were no longer part of the Chattanooga Ordinances when this action was filed.

On July 15, 1993, DLS, Inc. and Ann Martin initially applied for a business tax license for the establishment known as "Diamonds and Lace Showbar" at 115 Honest Street, Chattanooga, Tennessee, 37421. This license was approved by the Chattanooga Chief of Police and the City Treasurer on August 23, 1993, and this business was allowed to operate at all times pending final license approval. Following the granting of an adult entertainment license to Diamonds and Lace Showbar, an application for renewal was approved by the Chief of Police on September 21, 1994, and was continually approved on an annual basis after that time. At the time this lawsuit began, the Chattanooga adult establishment license for Diamonds and Lace Showbar did not expire until June 30, 1996. Since this litigation began, DLS, Inc. has continuously been allowed to operate and has never denied an adult-establishment license at any time by the City of Chattanooga.

Since Diamonds and Lace Showbar has held an adult-oriented establishment license as an "adult cabaret", several amendments have occurred to Chattanooga's Adult Establishment Ordinance. Ordinance No. 9980 was passed by the Chattanooga City Council on third and final reading on November 23, 1993.

That Ordinance specifically provided for due process protection to any applicant for an adult-oriented establishment license, when and if, any adult establishment license was

denied by the Chattanooga City Council and no agreement could be reached with the applicant. Pursuant to Ordinance No. 9980, the City was further required to institute suit for declaratory judgment in the Chancery Court of Hamilton County, Tennessee, within 5 days of the date any license was denied in order to seek an immediate judicial determination of whether such license or permit could be properly denied under the law. Following the ruling of Judge Edgar in *DLS, Inc., et al. v. City of Chattanooga, et al.*, 894 F.Supp. 1140 (E.D. Tenn. 1995), the Chattanooga City Council further revised portions of the Chattanooga Adult Establishment Ordinance by Ordinance No. 10270 on August 1, 1995, in order to more fully provide judicial interpretation of any license or permit revocation, suspension or renewal determination by the City of Chattanooga.

The definition of "adult cabaret" under Chattanooga City Code § 11-422 was also redefined by Ordinance No. 9980 in December of 1993. The stated purpose of these amendments to the Chattanooga Adult Establishment Ordinance were to adopt "content neutral, time, place and manner" regulations which were designed to serve a substantial governmental interest and to allow for reasonable alternative avenues of communication within the City of Chattanooga. Chattanooga Ordinance Nos. 9980 and 9982 were each adopted by the Chattanooga City Council based upon its own previous experience in regulating adult-oriented establishments and upon the experience of other cities such as Louisville, Kentucky and the State of Indiana. The City of Chattanooga is also currently in litigation with DLS, Inc. and a number of its employees in the Criminal Court of Hamilton County, Tennessee based upon violations of Chattanooga City Code § 25-85 which have been stayed to this point due to continuing appeals.

In the adoption of Chattanooga Ordinance No. 7420 on September 5, 1978, the City Commissioners specifically limited the application of it when they deleted any reference to "theaters" or "auditoriums" within the definition of "public place." This Ordinance amendment occurred over twenty (20) years ago due to a prior ordinance which was stricken after it was interpreted to deny protection granted to "legitimate theatrical performances." Following the passage of Chattanooga Ordinance No. 7420, two defendant dancers from the Night Haven Lounge in Chattanooga were later cited under the amended Ordinance when there was undisputed proof that they performed a dance routine attired in a "G-string" covering their genital areas and "clear pasties", if anything, covering their breasts. Convictions of both dancers were eventually upheld in Chattanooga City Court and in the Tennessee Supreme Court after consideration of First Amendment overbreadth challenges.

2. Prior Judicial Review

The Tennessee Supreme Court in *City of Chattanooga v. McCoy*, 645 S.W.2d 400 (Tenn. 1983) specifically considered the revisions to the Chattanooga City Code enacted in Ordinance No. 7420 and found as follows:

> In the instant case, Respondent assert no claim that their conduct involved any speech of expression of ideas entitled to First Amendment protection. Their challenge is based upon an alleged facial invalidity, that in substance says, some other person or persons may be prohibited from presenting in a public place an artistic, socially redeeming expression of ideas that involves some nudity. **The obvious thrust of the Chattanooga ordinance**

> **is to outlaw nudity and indecent sexual conduct in public without any express or implied intent to suppress or prohibit any legitimate speech or expression entitled to First Amendment protection**. It is a travesty to allow nude and crude public exhibitors of the human body, the privilege of asserting the rights of persons who contribute to society's permanent values and are entitled to First Amendment protection, and to read into a public indecency statute an intent to suppress free speech and expression. This Court is not willing to follow those cases that would recognize Respondent' First Amendment claim of overbreadth as valid. Any overbreadth in this ordinance is, in our opinion, minimal and insignificant. We understand *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 2d 830 (1973) to hold that where, as here, conduct, not speech, is sought to be regulated, the overbreadth must not only be real, but substantial as well, to violate the Federal Constitution. We hold the Chattanooga ordinance to be a valid exercise of the police powers of the State.
> (Emphasis supplied).

The Sixth Circuit below correctly reviewed the District Court's grant of Summary Judgment *de novo.* The Court reviewed and considered the plaintiff's principal contention that Public Chapter 542 violated the plaintiff's First Amendment rights to freedom of expression.

The Sixth Circuit properly considered whether this statute was a content neutral time, place and manner

restriction or a content based restriction subject to strict scrutiny analysis before proceeding further in its analysis. The Sixth Circuit clearly reviewed the preamble to Public Chapter 542 which plainly provides that it was enacted to combat the secondary effects of nude dancing establishments such as sexual assault, prostitution and other criminal activity and found that this State's statute was content neutral. Similar logic can be applied to the Chattanooga pastie and g-string ordinance which has been in effect since 1978 as well.

Having determined that the Tennessee State law was content neutral, the Sixth Circuit then turned its focus to the question of how to appropriately analyze the Ordinance to determine its constitutionality. The Sixth Circuit properly followed Justice Souter's concurring opinion in *Barnes v. Glenn Theatre, Inc.*, 501 U.S. 560 (1991), in this analysis. The plurality opinion of this Court in *Barnes* adopted the four-part test earlier developed in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), which provides that a statute is constitutionally valid if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on First Amendment freedom is no greater than is essential to the furtherance of that interest. The Sixth Circuit adequately considered all four prongs of the *O'Brien* test and found that Public Chapter 542 was a content-neutral restriction of free speech within the tenets of *Barnes* and *O'Brien* and did not violate the First Amendment right of any Petitioners to freedom of expression. The Sixth Circuit further held that there was no greater protection under the Tennessee Constitution for nude dancing as a form of expression than existed under the United States Constitution. This determination is likewise applicable to the ordinances of the City of Chattanooga at issue.

The Sixth Circuit expressly held that the Chattanooga plaintiff's attempt to differentiate their case from other Petitioners who attacked the Tennessee State Public Indecency Act was likewise invalid. The Sixth Circuit found that even though another Chattanooga City Ordinance specified a six-foot buffer zone restriction and forbade alcohol consumption, minimal pastie and g-string clothing requirements for dancers did not violate their freedom of expression. The Sixth Circuit found that the petitioner DLS, Inc.'s argument ignored the seminal point that "while the possibility of disease may be diminished due to an increased distance between dancer and patron and that a lack of alcohol may reduce violence, the associated crime effects still exist." The Sixth Circuit properly found that the Chattanooga Petitioners do not enjoy a more formidable challenge to Chapter 542's constitutionality. After a full review of the action of the District Court, the Sixth Circuit found that the Chattanooga City Ordinance and Chapter 542 essentially mirror one another. Any claims as to unconstitutionality of the Chattanooga City Ordinance, Section 25-85 and Section 11-435(c) likewise failed.

The Chattanooga Respondent submits that the Sixth Circuit correctly avoided any discussion of § 25-84 and § 11-434(j) because they did not prohibit and were not directed at nude dancing. Section 11-434(j) merely prescribes the contents of signs to be placed in adult-oriented establishments. The provisions of § 25-84 are significantly limited to those circumstances "where the exposing person may reasonably expect his conduct to be viewed by another for the purpose of sexual arousal, gratification or offending the viewing person".

The Chattanooga Respondent would submit that such provisions are not overbroad and are sufficiently limited to regulate that conduct of "flashers" or "exhibitionists" who

may expose themselves which has been found to be offensive within the Chattanooga community rather than any application to a nude dancing establishment where the patrons pay to view such information and are presumably not offended by sexually explicit display. As such, the Chattanooga Respondent submits that § 25-84 and § 11-434 are substantially narrow and are appropriate to be enforced where applicable.

The Chattanooga Respondent would submit that the ruling of the Sixth Circuit below is not a fractured interpretation of *Barnes*. This case has resulted from a fair and reasonable legal interpretation that requires minimal clothing requirements of pasties and g-strings for exotic dancers in adult establishments in Tennessee. Such regulations are not content based and have been correctly reviewed under *O'Brien* standards. As such, there is no compelling reason for this Court to revisit *Barnes* eight years after it was written.

(B) THE SIXTH CIRCUIT CORRECTLY DETERMINED THAT THE CHATTANOOGA CITY ORDINANCES REGULATING PUBLIC NUDITY COMPLIED WITH THE RATIONAL BASIS TEST REQUIRED BY THE FOURTEENTH AMENDMENT?

Insofar as the brief filed by Tennessee Attorney General Paul Summers contains an extensive Constitutional analysis relative to *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998) and other allegedly inconsistent rulings, the Chattanooga Respondent will not seek to duplicate the arguments relative to the constitutionality of Public Chapter 542 and attacks on what constitute the "narrowest grounds" of the *Barnes* decision. The Chattanooga Respondent will

adopt the argument of the Tennessee Attorney General relative to the constitutionality of Public Chapter 542 and why *Barnes* does not need to be reinterpreted based upon the arguments in this case.

The Chattanooga Respondent would submit that the Sixth Circuit adequately discussed the case law applicable to the Tennessee Indecency Statute and properly found that the Chattanooga City Ordinances were likewise Constitutional. The Sixth Circuit properly determined that all of the Chattanooga City Ordinances were content-neutral in their language and as applied. The Sixth Circuit properly found that these Ordinances did not violate the Chattanooga Petitioners' First Amendment rights to freedom of expression or under Article I, Section 19 of the Tennessee Constitution.

The Sixth Circuit properly considered the Petitioners' arguments that the Tennessee Public Indecency Statute was void for vagueness. The Sixth Circuit properly considered the Petitioners' arguments as to "theatrical production" and "public place" and found that such terms were not vague because they derived their definitions from either *Miller v. California*, 413 U.S. 15 (1973), or otherwise complied with a minimum degree of definiteness which did not render such phrases unconstitutionally vague.

The Sixth Circuit further considered Petitioners' arguments of overbreadth and specifically found that the State Public Indecency Act avoided any overbreadth problem by containing the very limitations and exclusions which the Petitioners' claimed rendered Chapter 542 vague. Respondent City of Chattanooga would further submit that Chattanooga City Code provisions of Section 25-85 had previously been given judicial limiting construction by the Tennessee Supreme Court in *City of Chattanooga v. McCoy*, *supra*, and that the

Sixth Circuit correctly applied the limiting language of the Tennessee Supreme Court to the application to the Chattanooga Ordinance as well.

2. THE SIXTH CIRCUIT PROPERLY DISMISSED THE CHATTANOOGA PETITIONERS' CASE ON THE MERITS IN LIGHT OF THE FAILURE OF THE CHATTANOOGA PETITIONERS TO RESPOND TO THE PENDING MOTION TO DISMISS BY CHATTANOOGA RESPONDENT.

Prior to any order of the Judicial Panel on Multi-District Litigation transferring this case to the Middle District of Tennessee, the Chattanooga Respondent moved Judge Edgar to dismiss this action on March 6, 1996, pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. At the time those motions were filed, State judicial proceedings concerning civil citations to Ann Martin and Renita Henegar, a dancer at DLS had been issued pursuant to Chattanooga City Code § 25-85 and were being litigated in the Tennessee State Courts at that time. All of the Chattanooga Respondent had moved Judge Edgar to dismiss the complaint based upon his previous rulings for the failure to state a claim upon which relief could be granted and upon *Younger*, *supra,* abstention grounds due to pending Tennessee State Court actions involving the Chattanooga City Ordinances. Pursuant to *Brandon v. Holt*, 469 U.S. 464, 471, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985), Petitioners' complaint failed to state a claim upon which relief could be granted under 42 U.S.C. § 1983 since they were only named in their capacities.

As indicated in the Statement of the Case, the Chattanooga Petitioners did not respond to the pending motion to dismiss at any time until after the Order of Judge Echols on

September 30, 1996, granted the motion to dismiss this Chattanooga Respondent. Pursuant to Rule 12(b), matters outside the pleading may be considered and the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. All parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56(e) of the Federal Rules of Civil Procedure. In the case at bar following the filing of the motion to dismiss on March 6, 1996, the Chattanooga Petitioners failed to respond or submit any affidavits for legal argument challenging the Respondent' motion until after the ruling of Judge Echols. Rule 56(e) clearly states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party **may not rest upon the mere allegations or denials of the adverse party's pleading**, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. **If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.**
> (Emphasis supplied)

The Chattanooga Respondent submit that the rulings of Judge Echols and the Sixth Circuit were appropriate since a number of the challenges to the Chattanooga Adult-Establishment Ordinance §§ 11-421, et seq. had already been considered by Judge Edgar and later by another panel of the Sixth Circuit in *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997).

The Chattanooga Respondent also submits that the claims of the Chattanooga Petitioners challenging the provisions of §§ 11-434(j) and 11-435(c)are now barred by the doctrine of *res judicata* based upon the holding of the Sixth Circuit in *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997). That panel of the Sixth Circuit previously reviewed another attack by this Petitioner of many of the same provisions of the Chattanooga Adult Establishment Ordinance which are again challenged in this shotgun style attack. To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

At this point in time, it is obvious that where the Chattanooga Petitioners have previously challenged and have failed to appeal such ruling, this Court should not grant Certiorari to interpret the same sections construed and found to be Constitutional in *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997). The Chattanooga Respondent would submit that the Chattanooga Petitioners have had a full and fair opportunity to litigate the Constitutionality of many sections of the Chattanooga Adult-Oriented Establishment Ordinance before the Sixth Circuit on a prior occasion and that the Chattanooga Petitioners are now barred by the doctrine of *res judicata* from relitigating the same questions which were or could have been litigated in the first action. The failure to seek a Writ of Certiorari on a prior occasion involving an identical ordinance section is a compelling reason to deny this Writ on behalf of the Chattanooga Petitioners.

3. THE PASSAGE OF THE STATE LAW ON PUBLIC INDECENCY, CHAPTER 542, DID NOT EFFECTIVELY PREEMPT LOCAL ORDINANCES AGAINST PUBLIC NUDITY.

The argument of preemption of local municipalities by the passage of Public Chapter 542 (codified at T.C.A. § 39-13-511) was clearly considered by Judge Edgar in his Memorandum Opinion of October 12, 1995. (Included as Appendix 104 to Petition for Writ of Certiorari of DLS, Inc.).

Judge Edgar clearly determined that conflict with the law of the State is the key point to be considered in an analysis of whether a local ordinance is pre-empted by State law in Tennessee. He reviewed Public Chapter 542 and Chattanooga City Code § 25-85 and determined that those two provisions defined "public place" somewhat differently. He further found that this difference did not amount to such a conflict as would nullify the local ordinance. On those factors applicable to nude dancing, Judge Edgar found that there was no appreciable difference between § 25-85 and the State statute especially in light of the narrow construction of the Tennessee Supreme Court of the Chattanooga Ordinance.

Absent some specific language by the State Legislature declaring its intentions that a particular statute should preempt local ordinances, the mere fact that the State, in the exercise of the police power has made certain regulations does not... prohibit a municipality from exacting additional requirements. See, *Southern Railway v. City of Knoxville*, 432 S.W.2d 619 (Tenn. 1968).

The Chattanooga Respondent would submit that T.C.A. § 39-13-511 does not preempt the adoption of local ordinances as a matter of Tennessee State law. Clearly, in the

case at bar since the Chattanooga Ordinance has been in effect since 1978, the General Assembly could have chosen to preempt any local action if it had so chosen to do. The Tennessee General Assembly has elected to preempt any other regulation in the areas of gambling (T.C.A. § 39-17-509); legislation regarding the regulation of tobacco products (T.C.A. § 39-17-1551); blasting standards (T.C.A. § 68-105-110); and manufactured home anchoring systems (T.C.A. § 68-126-412).

There is no Tennessee statute which preempts municipalities from regulating nude dancing. To the contrary, T.C.A. § 7-51-1406 clearly states

> "Nothing in this chapter shall preempt or prevent political subdivisions in this State from enacting and enforcing other lawful and reasonable restrictions, regulations, licensing, zoning and other civil or administrative provisions concerning the location, configuration, code compliance or other business operation or requirements of adult-oriented establishments and sexually oriented businesses.

As such, the Chattanooga Respondent would submit that the Sixth Circuit properly applied the law without considering preemption in this case. In any event, a state law preemption question is not a compelling reason for this Court to grant a Writ of Certiorari within Supreme Court Rule 10 as requested by Petitioners.

CONCLUSION

The Chattanooga Respondent would submit that none of the reasons set forth in the Writ of Petitioner, DLS, Inc. constitute compelling reasons for this Court to grant the Writ in accordance with Supreme Court Rule 10. The Ruling of the Sixth Circuit below does not conflict with relevant decisions of this Court or call for an exercise of this Court's supervisory power. Respondent submits that there is no inherent conflict in the ruling of the Sixth Circuit below which would require *Barnes* to be revisited. The Sixth Circuit correctly and appropriately applied this court's ruling in *Barnes* and considered the constitutionality of this Tennessee statute and the Chattanooga Ordinance based upon the existing law. As such, the Chattanooga Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari by DLS, Inc. in this case.

Respectfully submitted,

/s/_____
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/s/_____
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Appendix A

CHATTANOOGA CITY CODE

Sec. 25-84. Indecent exposure.

It shall be unlawful for any person in the city in a public place to engage in the willful and intentional exposure of such person's genitals or buttocks to one (1) or more other persons where the exposing person may reasonably expect his conduct to be viewed by another for the purpose of sexual arousal, gratification or offending the viewing person. (Code 1986, § 25-84)

State law reference--Similar provisions, T.C.A., § 39-2-614(a).

Sec. 25-85. Lewd and indecent conduct.

(a) Definitions. As used in this section, the following terms shall have the meanings indicated:

Public place shall include: streets, sidewalks or highways; transportation facilities; schools; places of amusement; parks, playgrounds; restaurants; nightclubs; cocktail lounges; burlesque houses; bars; cabarets; taverns; taprooms; private fraternal, social, golf or country clubs; or any place that allows the consumption of intoxicating beverages on the premises.

Wholly or substantially exposed to public view, as it pertains to breasts, shall mean the showing of the female breast, in a public plaice, with less than a fully opaque covering of any portion of the breast below the top of the nipple.

(b) Prohibited acts. It shall be unlawful for any person to perform in a public place, or for any person who owns or operates premises constituting a public place to knowingly permit or allow to be performed therein, any of the following acts or conduct:

(1) The performance of acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;

(2) The actual or simulated touching, caressing or fondling of the breasts, buttocks, anus or genitals in public; or

(3) The actual or simulated public displaying of the pubic hair, anus, vulva or genitals;

(4) The appearance by any female in a public place so costumed or dressed that one or both breasts are wholly or substantially exposed to public view, or any owner or operator of premises constituting a public place knowingly permitting or allowing any such person to appear on the premises owned or operated by him.

(c) Penalty. Any person violating any of the provisions of this section, upon conviction by the court, may be imprisoned for not more than thirty (30) days, and shall be fined not less than twenty-five dollars ($25.00), nor more than fifty dollars ($50.00) for each violation. (Code 1986, § 25-85)

Cross reference--Definitions and rules of construction generally, § 1-2.

ARTICLE XIV. ADULT-ORIENTED ESTABLISHMENTS[10]

Sec. 11-421. Findings and purpose.

(a) The city council of the City of Chattanooga, Tennessee, finds:

(1) That homogeneous and heterogeneous masturbatory acts and other sexual acts, including oral sex acts, are being done in adult-oriented establishments in the City of Chattanooga.

(2) That offering and providing such space, areas, and rooms where such activities may take place creates conditions that generate prostitution and other crimes.

(3) That several days and nights of the week such adult-oriented establishments, particularly adult book stores containing mini-motion picture facilities, are overcrowded and contain more persons than such structures can safely accommodate resulting in a definite fire hazard since in the event of fire such persons would not be able to safely leave all the cubicles, booths and rooms of such establishments.

(4) That male prostitutes, particularly teenage males, frequent said establishments for the purpose of providing, within the premises of such establishments, sex-for-hire.

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10 Editor's note--The substantive provisions of Ord. No. 8601, enacted March 4, 1986, are codified herein at the request of the city;, designation of such provisions as Art. XIV, §§ 11-42111-437 was at the discretion of the editors.

Cross reference - Variances and special exceptions for adult-oriented establishments in C-I, C-2, C-3 and M-1 zones, App. B, Art. VIII, § 106.2(n).

(5) That the continued unregulated operation of adult-oriented establishments would be detrimental to the general welfare, health, and safety of the citizens of the City of Chattanooga.

(b) It is the purpose of this article to promote and secure the general welfare, health, and safety of the citizens of the City of Chattanooga. (Code 1986, § 11-421; Ord. No. 9654, § 2, 1-6-92)

Editor's note--The substantive provisions of Ord. No. 8601, enacted March 4, 1986, are codified herein at the request of the city;, designation of such provisions as Art. XIV, §§ 11-42111-437 was at the discretion of the editors.

Cross reference - Variances and special exceptions for adult-oriented establishments in C-I, C-2, C-3 and M-1 zones, App. B, Art. VIII, § 106.2(n).

Sec. 11-422. Definitions.

For the purpose of this article, the words and phrases used herein shall have the following meanings, unless otherwise clearly indicated by the context:

(a) *Adult-oriented establishment* shall include, but not be limited to, "adult bookstores,"" adult motion picture theaters," "adult mini-motion picture establishments," or "adult cabaret" and further means any premises to which the public patrons or members are invited or admitted and which are so physically arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises for the purpose of viewing adult-oriented motion pictures, or wherein an entertainer provides adult entertainment to a member of the public, a patron or a member, when such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect. An

"adult-oriented establishment" further includes, without being limited to, any "adult entertainment studio" or any premises that is physically arranged and used as such, whether advertised or represented as an adult entertainment studio, rap studio, exotic dance studio, encounter studio, sensitivity studio, modeling studio or any other term of like import.

(b) Adult bookstore means an establishment having as a substantial or significant portion of its stock and trade in books, films, video cassettes, or magazines and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined below, and in conjunction therewith have facilities for the presentation of adult entertainment, as defined below, and including adult-oriented films, movies, or live entertainment, for observation by patrons therein.

(c) *Adult motion picture* theater means an enclosed building with a capacity of fifty. (50) or more persons regularly; used for presenting material having as a dominant theme or presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," as defined below, for observation by patrons therein.

(d) *Adult mini-motion picture* theater means an enclosed building with a capacity of less than fifty (50) persons regularly used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," as defined below, for observation by patrons therein.

(e) *Adult cabaret* is defined to mean an establishment which features as a principle use of its business, entertainers and/or waiters and/or bartenders who expose to public view of the patrons within said establishment, at any time, the bare female breast below a point immediately above the top of the areola, human genitals, pubic region, or buttocks, even if partially covered by opaque material or completely covered by translucent material; including swim suits, lingerie or latex covering. Adult cabarets shall include commercial establishments which feature entertainment of an erotic nature including exotic dancers, strippers, male or female impersonators, or similar entertainers.

(f) *City Council* means the City Council of the City of Chattanooga, Tennessee.

(g) *Employee* means any and all persons, including independent contractors, who work in or at or render any services directly related to the operation of an adult-oriented establishment.

(h) *Entertainer* means any person who provides entertainment within an adult-oriented establishment as defined in this section, whether or not a fee is charged or accepted for entertainment and whether or not entertainment is provided as an employee or an independent contractor.

(i) *Adult-entertainment* means any exhibition of any adult-oriented motion pictures, live performance, display or dance of any type, which has a significant or substantial portion of such performance any actual or simulated performance of specified sexual activities or exhibition and viewing-of specified anatomical areas, removal of articles of clothing or appearing unclothed, pantomime, modeling, or

any other personal service offered customers.

(j) *Operator* means any person, partnership, or corporation operating, conducting or maintaining an adult-oriented establishment.

(k) *Specified sexual* activities means:

(1) Human genitals in a state of sexual stimulation or arousal;

(2) Acts of human masturbation, sexual intercourse or sodomy;

(3) Fondling or erotic touching of human genitals, pubic region, buttock or female breasts.

(l) *Specified anatomical areas* means:

(1) Less than completely and opaquely covered:
(i) Human genitals, pubic region;
(ii) Buttocks;
(iii) Female breasts below a point immediately above the top of the areola; and

(2) Human male genitals in a discernibly turgid state, even if completely opaquely covered.

(Code 1986, § 11-422; Ord. No. 9654, § 87, 1-6-92; Ord. No. 9982, § 2, 12-14-93; Ord. No. 10178; § 1, 3-7-95)

Sec. 11-423. License required.

(a) Except as provided in subsection (e) below, *from and after the* effective date of this article, no adult-oriented establishment shall be operated or maintained in the City of Chattanooga without first obtaining a license to operate issued by the City of Chattanooga.

(b) A license may be issued only for one (1) adult-oriented establishment located at a fixed and certain place. Any person, partnership, or corporation which desires to operate more than one (1) adult-oriented establishment must have a license for each.

(c) No license or interest in a license may be transferred to any person, partnership or corporation.

(d) It shall be unlawful for any entertainer, employee or operator to knowingly work in or about, or to knowingly perform any service directly related to the operation of any unlicensed adult-oriented establishment.

(e) All existing adult-oriented establishments at the time of the passage of this article must submit an application for a license within one hundred twenty (120) days of the passage of this article on third and final reading. If a license is not issued within said one-hundred-twenty-day period, then such existing adult-oriented establishment shall cease operations. (Code 1986, § 11-423)

Sec. 11-424. Application for license.

(a) Any person, partnership, or corporation desiring to secure a license shall make application to the city treasurer. The application shall be filed in triplicate with and dated by the city treasurer. A copy of the application shall be distributed promptly by the city treasurer to the Chattanooga Police Department and to the applicant.

(b) The application for a license shall be upon a form provided by the city treasurer. An applicant for a license including any partner or limited partner of the partnership applicant, and any officer or director of the corporate applicant and any stockholder holding more than five (5) percent of the stock of a corporate applicant, or any other person who is interested directly in the ownership or operation of the business, shall furnish the following information under oath:

(1) Name and address, including all aliases.

(2) Written proof that the individual is at least eighteen (18) years of age.

(3) All residential addresses of the applicant for the past three (3) years.

(4) The applicant's height, weight, color of eyes and hair.

(5) The business, occupation or employment of the applicant for five (5) years immediately preceding the date of the application.

(6) Whether the applicant previously operated in this or any other county, city or state under an adult-oriented establishment license or similar business license: whether the applicant has ever had such a license revoked or suspended, the reason therefor, and the business entity or trade name under which the applicant operated that was subject to the suspension or revocation:'

(7) All criminal statutes, whether federal or state, or city ordinance violation convictions, forfeiture of bond and pleadings of nolo contendere on all charges, except minor traffic violations.

(8) Fingerprints and two (2) portrait photographs at least two (2) inches by two (2) inches of the applicant.

(9) The address of the adult-oriented establishment to be operated by the applicant.

(10) The names and addresses of all persons, partnerships, or corporations holding any beneficial interest in the real estate upon which such adult-oriented establishment is to be operated, including but not limited to, contract purchasers or sellers, beneficiaries of land

trust or lessees subletting to applicant.

(11) If the premises are leased or being purchased under contract, a copy of such lease or contract shall accompany the application.

(12) The length of time the applicant has been a resident of the City of Chattanooga, or its environs, immediately preceding the date of the application.

(13) If the applicant is a corporation, the application shall specify the name of the .corporation, the date and state of incorporation, the name and address of the registered agent and the name and address of all principal shareholders, officers and directors of the corporation.

(14) A statement by the applicant that he or she is familiar with the provisions of this article and is in compliance with them.

(15) All inventory, equipment, or supplies which are to be leased, purchased, held in consignment or in any other fashion kept on the premises or any part or portion thereof for storage, display, any other use therein, or in connection with the operation of said establishment, or for resale, shall be identified in writing accompanying the application specifically designating the distributor business name, address phone number, and representative's name.

(c) Within ten (10) days of receiving the results of the investigation conducted by the Chattanooga Police Department, the city treasurer shall notify the applicant that his application is granted, denied or held for further investigation. Such additional investigation shall not exceed an additional thirty (30) days unless otherwise agreed to by the applicant. Upon conclusion of such additional investigation,

the city treasurer shall advise the applicant in writing whether the application is granted or denied.

(d) Whenever an application is denied or held for further investigation, the city treasurer shall advise the applicant in writing of the reasons for such action. If the applicant requests a hearing within ten (10) days of receipt of notification of denial, a public hearing shall be held thereafter before the city council at which time the applicant may present evidence as to why his license should not be denied. The city council shall hear evidence as to the basis of the denial and shall affirm or reject the denial of an application at the hearing. If any application for an adult-oriented establishment license is denied by the city council and no agreement is reached with the applicant concerning the basis for denial, the city attorney shall institute suit for declaratory judgment in the Chancery Court of Hamilton County, Tennessee, within five (5) days of the date of any such denial and shall seek an immediate judicial determination of whether such license or permit may be properly denied under the law.

(e) Failure or refusal of the applicant to give any information relevant to the investigation of the application, or his or her refusal or failure to appear at any reasonable time and place for examination under oath. regarding said application or his or her refused to submit to or cooperate with any investigation required by this article, shall constitute an admission by the applicant that he or she is ineligible for such license and shall be grounds for denial thereof by the city treasurer.

(Code 1986, § 11-424; Ord. No. 9654, § 2, 1-6-92; Ord. No. 9980, § 1, 11-23-93)

Sec. 11-425. Standards for issuance of license.

(a) To receive a license to operate an adult-oriented establishment, an applicant must meet the following standards:

(1) If the applicant is an individual:

(i) The applicant shall be at least eighteen (18) years of age.

(ii) The applicant shall not have been convicted of or pleaded nolo contendere to a felony or any crime involving moral turpitude, prostitution, obscenity, or other crime of a sexual nature in any jurisdiction within five (5) years immediately preceding the date of the application.

(iii) The applicant shall not have been found to have previously violated this article within five (5) years immediately preceding the date of the application.

(2) If the applicant is a corporation:

(i) All officers, directors and stockholders required to be named under section 11-424 (b) shall be at least eighteen (18) years of age.

(ii) No officer, director or stockholder required to be named under section 11-424(b) shall have been convicted of or pleaded nolo contendere to a felony or any crime involving moral turpitude, prostitution, obscenity or other crime of a sexual nature in any jurisdiction within five (5) years immediately preceding the date of the application;

(iii) No officer, director, or stockholder required to be named under section 11-424(b) shall have been found to have previously violated this article within five (5) years immediately preceding the date of the application.

(3) If the applicant is a partnership, joint venture, or any other type of organization where two (2) or more persons have a financial interest:

(i) All persons having a financial interest in the partnership, joint venture or other type of organization shall be at least eighteen (18) years of age.

(ii) No persons having a financial interest in the partnership, joint venture or other type of organization shall have been convicted of or pleaded nolo contendere to a felony or any crime involving moral turpitude, prostitution, obscenity or other crime of a sexual nature in any jurisdiction within five (5) years immediately preceding the date of the application.

(iii) No persons having a 'financial interest in the partnership, joint venture or other type of organization shall have been found to have previously violated this article within five (5) years immediately preceding the date of the application.

(b) No license shall be issued unless the Chattanooga Police Department has investigated the applicant's qualifications to be licensed. The results of that investigation shall be filed in writing with the city treasurer no later than twenty (20) days after the date of the application. (Code 1986, § 11-425)

Sec. 11-426. Permit required.

In addition to the license requirements previously set forth for owners and operators of "adult-oriented establishments," no person shall be an employee or entertainer in an adult-oriented establishment without first obtaining a

valid permit issued by the city treasurer.

(Code 1986, § 11-426; Ord. No. 10178, § 2, 3-7-95)

Sec. 11-427. Application for permit.

(a) Any person desiring to secure a permit shall make application to the city treasurer. The application shall be fried in triplicate with and dated by the city treasurer. A copy o£ the application shall be distributed promptly by the city treasurer to the Chattanooga Police Department and to the applicant.

(b) The application for a permit shall be upon a form provided by the city treasurer. An applicant for a permit shall furnish the following information under oath:

(1) Name and address, including all aliases.

(2) Written proof that the individual is at least eighteen (18) years of age.

(3) All residential addresses of the applicant for the past three (3) years.

(4) The applicant's height, weight, color of eyes, and hair.

(5) The business, occupation or employment of the applicant for five (5) years immediately preceding the date of the application.

(6) Whether the applicant, while previously operating in this or any other city or state under an adult-oriented establishment permit or similar business for whom applicant was employed or associated at the time, has ever had such a permit revoked or suspended, the reason therefor, and the business entity or trade name for whom the applicant was employed or associated at the time of such suspension or revocation.

(7) All criminal statutes, whether federal, state or city ordinance violation, convictions, forfeiture of bond and pleadings of nolo contendere on all charges, except minor traffic violations.

(8) Fingerprints and two (2) portrait photographs at least two (2) inches by two (2) inches of the applicant.

(9) The length of time the applicant has been a resident of the City of Chattanooga, or its environs, immediately preceding the date of the application.

(10) A statement by the applicant that he or she is familiar with the provisions of this article and is in compliance with them.

(c) Within ten (10) days of receiving the results of the investigation conducted by the Chattanooga Police Department, the city treasurer shall notify the applicant that his application is granted, denied, or held for further investigation. Such additional investigation shall not exceed an additional thirty (30) days unless otherwise agreed to by the applicant. Upon the conclusion of such additional investigations, the city treasurer shall advise the applicant in writing whether the application is granted or denied.

(d) Whenever an application is denied or held for further investigation, the city treasurer shall advise the applicant in writing of the reasons for such action. If the applicant requests a hearing within ten (10) days of receipt of notification of denial, a public hearing shall be held thereafter before the city council at which time the applicant may present evidence bearing upon the question.

(e) Failure or refusal of the applicant to give any information relevant to the investigation of the application, or his or her refusal or failure to appear at any reasonable time and place for examination under oath regarding said application or his or her refusal to submit to or cooperate with any investigation required by this article, shall constitute an

admission by the applicant that he or she is ineligible for such permit and shall be grounds for denial thereof by the board. (Code 1986, § 11-427; Ord. No. 9654, § 2, 1-6-92)

Sec. 11-428. Standards for issuance of permit.

(a) To receive a permit as an employee, an applicant must meet the following standards:

(1) The applicant shall be at least eighteen (18) years of age.

(2) The applicant shall not have been convicted of or pleaded no contest to a felony or any crime involving moral turpitude or prostitution, obscenity or other crime of a sexual nature in any jurisdiction within five (5) years immediately preceding the date of the application.

(3) The applicant shall not have been found to violate any provision of this article within five (5) years immediately preceding the date of the application.

(b) No permit shall be issued until the Chattanooga Police Department has investigated the applicant's qualifications to receive a permit. The results of that investigation shall be filed in writing with the city treasurer not later than twenty (20) days after the date of the application. (Code 1986, § 11-428)

Sec. 11-429. Fees.

(a) A license fee of five hundred dollars ($500.00) shall be submitted with the application for a license. If the application is denied, one-half (½) of the fee shall be returned.

(b) A permit fee of one hundred dollars ($100.00) shall be submitted with the application for a permit. If the

application is denied, one-half (½) of the fee shall be returned. (Code 1986, § 11-429)

Sec. 11-430. Display of license or permit.

(a) The license shall be displayed in a conspicuous public place in the adult-oriented establishment.

(b) The permit shall be carried by an employee upon his or her person and shall be displayed upon request of a customer, any member of the Chattanooga Police Department, or any person designated by the city council. (Code 1986, § 11-430; Ord. No. 9654, § 87, 1-6-99.)

Sec. 11-431. Renewal of license or permit.

(a) Every license issued pursuant to this article will terminate at the expiration of one (1) year from the date of issuance, unless sooner revoked, and must be renewed before operation is allowed in the following year. Any operator desiring to renew a license shall make application to the city treasurer. The application for renewal must be filed not later than sixty days (60) days before the license expires. The application for renewal shall be filed in triplicate with and dated by the city treasurer. A copy of the application for renewal shall be fried in triplicate with and dated by the city treasurer. A copy of the application for renewal shall 'be distributed promptly by the city treasurer to the Chattanooga Police Department and to the operator. The application for renewal shall be upon a form provided by the city treasurer and shall contain such information and data, given under oath or affirmation, as may be required by the city council.

(b) A license renewal fee of five hundred dollars ($500.00) shall be submitted with the application for renewal. In addition to the renewal fee, a late penalty of one hundred dollars ($100.00) shall be assessed against the applicant who files for a renewal less than sixty (60) days before the license expires. If the application is denied, one-half (½) of the total fees collected shall be returned.

(c) If the Chattanooga Police Department is aware of any information bearing on the operator's qualifications, that information shall be filed in writing with the city treasurer.

(d) Every permit issued pursuant to this article will terminate at the expiration of one (1) year from the date of issuance unless sooner revoked, and must be renewed before an employee is allowed to continue employment in an adult-oriented establishment in the following calendar year. Any employee desiring to renew a permit shall make application to the city treasurer. The application for renewal must be filed not later than sixty (60) days before the permit expires. The application for renewal shall be filed in triplicate with and dated by the city treasurer. A copy of the application for renewal shall be distributed promptly by the city treasurer to the Chattanooga Police Department and to the employee. The application for renewal shall be upon a form provided by the city treasurer and shall contain such information and data, given under oath or affirmation, as may be required by the city treasurer.

(e) A permit renewal fee of one hundred dollars ($100.00) shall be submitted with the application for renewal. In addition to said renewal fee, a late penalty of fifty dollars ($50.00) shall be assessed against the applicant who files for renewal less than sixty (60) days before the license expires. If the application is denied, one-half (½) of the fee shall be returned.

(f) If the Chattanooga Police Department is aware of any information bearing on the employee's qualifications, that information shall be filed in writing with the city treasurer. (Code 1986, § 11-431; Ord. No. 9654, § 2, 1-6-92)

Sec. 11432. Revocation of license or permit.

(a) The mayor shall revoke a license or permit for any of the following reasons:

(1) Discovery that false or misleading information or data was given on any application or material facts were omitted from any

application.

(2) The operator, entertainer, or any employee of the operator, violates any provision of this article or any rule or regulation adopted by the city council pursuant to this article; provided, however, that in the case of a first offense by an operator where the conduct was solely that of an employee, the penalty shall not exceed a suspension of thirty (30) days if the city council shall find that the operator had no actual or constructive knowledge of such violation and could not by the exercise of due diligence have had such actual or constructive knowledge.

(3) The operator or employee becomes ineligible to obtain a license or permit.

(4) Any cost or fee required to be paid by this article is not paid.

(5) An operator employs an employee who does not have a permit or provides space on the premises, whether by lease or otherwise, to an independent contractor who performs or works as an entertainer without a permit.

(6) Any intoxicating liquor, cereal malt beverage, narcotic or controlled substance is allowed to be sold or consumed on the licensed premises.

(7) Any operator, employee or entertainer sells, furnishes, gives or displays, or causes to be sold, furnished, given or displayed to any minor any adult-oriented entertainment or adult-oriented material.

(8) Any operator, employee or entertainer denies access of law enforcement personnel to any portion of the licensed premises wherein adult-oriented entertainment is permitted or to any

portion of the licensed premises wherein adult-oriented material is displayed or sold.

(9) Any operator allows continuing violations of the rules and regulations of the Chattanooga-Hamilton County Health Department.

(10) Any operator fails to maintain the licensed premises in a clean, sanitary and safe condition.

(b) The mayor, before revoking or suspending any license or permit, shall give the operator or employee at least ten (10) days' written notice of the charges against him or her and the opportunity for a public hearing before the city council, at which time the operator or employee may present evidence bearing upon the question. In such cases, the charges shall be specific and in writing.

(c) The transfer of a license or any .interest in a license shall automatically and immediately revoke the license. The transfer of any interest in a nonindividual operator's license shall automatically and immediately revoke the license held by the operator.

(d) Any operator or employee whose license or permit is revoked shall not be eligible to receive a license or permit for five (5) years from the date of revocation. No location or premises for which a license has been issued shall be used as an adult-oriented establishment for two (2) years from the date of revocation of the license.
(Code 1986, § 11-432; Ord. No. 9654, §§ 2, 13, & 88, 1-6-92)

Sec. 11-433. Hours of operation.

(a) No adult-oriented establishment shall be open between the hours of 3:00 a.m. and 8:00 a.m. on weekdays or between the hours of 3:00 a.m. and 12:00 noon on Sundays.

(b) All adult-oriented establishments shall be open to inspection at all reasonable times by the Chattanooga Police

Department or such other persons as the city council may designate.
(Code 1986, § 11-433; Ord. No. 9654, § 2, 1-6-92)

Sec. 11-434. Responsibilities of the operator.

(a) The operator shall maintain a register of all employees, showing the name, and aliases used by the employee, home address, age, birthdate, sex, height, weight, color of hair and eyes, phone numbers, social security number, date of employment and termination, and duties of each employee and such other information as may be required by the city council. The above information on each employee shall be maintained in the register on the premises for a period of three (3) years following termination.

(b) The operator shall make the register of employees available immediately for inspection by police upon demand of a member of the Chattanooga Police Department at all reasonable times.

(c) Every act or omission by an employee constituting a violation of the provisions of this article shall be deemed the act or omission of the operator if such act or omission occurs either with the authorization, knowledge, or approval of the operator, or as a result of the operator's negligent failure to supervise the employee's conduct, and the operator shall be punishable for such act or omission in the same manner as if the operator committed the act or caused the omission.

(d) An operator shall be responsible for the conduct of all employees while on the licensed premises and any act or omission of any employee constituting a violation of the provisions of this article shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended or renewed.

(e) There shall be posted and conspicuously displayed in the common areas of each adult-oriented establishment a list of any and all entertainment provided on the premises. Such list shall further indicate the specific fee or charge in dollar amounts for each entertainment listed. Viewing adult-

oriented motion pictures shall be considered as entertainment. The operator shall make the list available immediately upon demand of the Chattanooga Police Department at all reasonable times.

(f) No employee of an adult-oriented establishment shall allow any minor to loiter around or to frequent an adult-oriented establishment or to allow any minor to view adult entertainment as defined herein.

(g) Every adult-oriented establishment shall be physically arranged in such a manner that the entire interior portion of the booths, cubicles, rooms or stalls, wherein adult entertainment is provided, shall be visible from the common area of the premises. Visibility shall not be blocked or obscured by doors, curtains, partitions, drapes, or any other obstruction whatsoever. It shall be unlawful to install booths, cubicles, rooms or stalls within adult-oriented establishments for whatever purpose, but especially for the purpose of secluded viewing of adult-oriented motion pictures or other types of adult entertainment.

(h) The operator" shall be responsible for and shall provide that any room or area used for the purpose of viewing adult-oriented motion pictures or other types of live adult entertainment shall be readily accessible at all times and shall be continuously opened to view in its entirety.

(i) No operator, entertainer, or employee of an adult-oriented establishment shall demand or collect all or any portion of a fee for entertainment before its completion.

(j) A sign shall be conspicuously displayed in the common area of the premises, and shall read as follows:

> *This Adult-Oriented Establishment is Regulated by Chattanooga City Code, Parc II [Chapter 11], Article XV, Section[s] 11-421 through 11-457. Entertainers Are:*
>
> *1. Not permitted to engage in any type of sexual conduct;*

2. *Not permitted to expose their sex organs;*

3. *Not permitted to demand or collect all or any portion of a fee for entertainment before its completion.*

(Code 1986, § 11-434; Ord. No. 9654, § 2, 1-6-92)

Sec. 11-435. Prohibitions and unlawful sexual acts.

(a) No operator, entertainer, or employee of an adult-oriented establishment shall permit to be performed, offer to perform, perform or allow customers, employees or entertainers to perform sexual intercourse or oral or anal copulation or other contact stimulation of the genitalia.

(b) No operator, entertainer, or employee shall encourage or permit any person upon the premises to touch, caress, or fondle the breasts, buttocks, anus or genitals of any other person.

(c) No operator, entertainer, employee, or customer shall be unclothed or in such attire, costume, or clothing so as to expose to view any portion of the sex organs, breasts or buttocks of said operator, entertainer, or employee with the intent to arouse or gratify the sexual desires of the operator, entertainer, employee, or customer.

(d) No entertainer, employee or customer shall be permitted to have any physical contact with any other on the premises during any performance and all performances shall only occur upon a stage at least eighteen inches (18") above the immediate floor level and removed at least six feet (6') from the nearest entertainer, employee and/or customer.
(Code 1986, 9 11-435; Ord. No. 10178, 99 8-4, 8-7-95)

Sec. 11-436. Penalties and prosecution.

(a) Any person, partnership, or corporation who is found to have violated this article shall be fined a definite sum not exceeding fifty dollars ($50.00) and shall result in the suspension or revocation of any permit or license.

(b) Each violation of this article shall be considered a separate offense, and any violation continuing more than one (1) hour of time shall be considered a separate offense for each hour of violation. (Code 1986, 9 11-436)

Sec. 11-487. Invalidity of part.

Should any court of competent jurisdiction declare any section, clause, or provision of this article to be unconstitutional, such decision shall affect only such section, clause, or provision so declared unconstitutional, and shall not affect any other section, clause or provision of this article. (Code 1986, 9 11-437)

Secs. 11-438-- 11-449. Reserved.

ARTICLE XV. TEEN SOCIAL CLUBS

Sec. 11-450. Definitions.

For purposes of this Article, the words and phrases used herein shall have the following meanings, unless otherwise clearly indicated by the context:

(a) Teen *social club* shall include, but not be limited to, any business establishment which advertises itself or holds itself out to the public as a "teen club" or "teen dance club" and which provides entertainment and social activities to which public patrons or members between the ages of 12 and 21 are admitted to participate regardless of whether such establishment is conducted, operated, or maintained for a profit.

ORDINANCE NO. 10270

AN ORDINANCE TO AMEND CHATTANOOGA CITY CODE, PART II, CHAPTER 11, RESTIVE TO ADULT-ORIENTED ESTABLISHMENTS.

SECTION 1. BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHATTANOOGA, TENNESSEE, that Chattanooga city Code, Part II, Section 11-424(b) be and hereby is amended by deleting the second sentence thereof up to and including the colon and inserting in lieu thereof the following:

> An applicant for a license shall furnish the following information under oath:

SECTION 2. BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHATTANOOGA, TENNESSEE, that Chattanooga city Code, Part II, Section 11-424(b) be and hereby is amended by deleting subsection (b) (13) in its entirety and inserting in lieu thereof the following:

> (13) If the applicant is a corporation, the application shall specify the name, address and telephone number of the corporation, the date and state of incorporation, the name and address of the registered agent for service of process of the corporation, the names and addresses of the officers and directors of the corporation, and the names and addresses of any persons holding fifty percent (50%) or more of the stock of the corporation; if the applicant is a partnership, the application shall specify the name and address of the partnership, the name and address of all general partners of the partnership; if the partnership is a limited partnership, the application shall specify the name and address of all general partners who have a controlling interest in the partnership.

SECTION 3. BE IT FURTHER ORDAINED that Chattanooga City Code, Part II, be and hereby is amended by adding a new section 11-438 as follows:

§11-438. Denial of Applications or Renewals.

(a) As used in this section, "application" shall mean "(i) an application for a license, (ii) an application for a permit, (iii) an application for a license renewal, and (iv) an application for a permit renewal.

(b) Whenever an application is denied, the city Treasurer shall notify the applicant in writing of the reasons for such action; such notice shall also advise the applicant of the applicant's right to request a hearing before the City Council. If the applicant desires to request a hearing before the City Council to contest the denial of an application, such request shall be made in writing to the Clerk of the City Council within ten (10) days of the applicant's receipt of the notification of the denial of the application. If the applicant timely requests such a hearing, a public hearing shall be held within fifteen (15) days of the Clerk's receipt of such request before the city Council at which time the applicant may present evidence as to why the application should not be denied. The City Council shall hear evidence concerning the basis for denial of the application and shall affirm or reverse the denial of an application at the conclusion of said hearing; any such hearing shall be concluded no later than twenty-two (22) days after the applicant's receipt of notification of denial of an application, unless an extension beyond such time period is requested by the applicant and granted by the City Council.

(c) If the City Council affirms the denial of an application, the office of the City Attorney

shall institute suit for declaratory judgment in a court of record in Hamilton County, Tennessee, within five (5) days of the date of any such denial seeking an immediate judicial determination of whether such application has been properly denied under the law.

SECTION 4. BE IT FURTHER ORDAINED that Chattanooga City Code, Part II, Section 11-424(d), be and hereby is amended by deleting said subsection in its entirety and redesignating subsection 1!-424(e) as 11-424(d).

SECTION 5. BE IT FURTHER ORDAINED that Chattanooga City Code, Part II, Section 11-427(d), be and hereby is amended by deleting said subsection in its entirety and redesignating subsection 11-427(e) as 11-427(d).

SECTION 6. BE IT FURTHER ORDAINED that Chattanooga City Code, Part II, Section 11-431, be and hereby is amended by adding a new subsection (g) as follows:

(g) Notwithstanding anything herein to the contrary, any application for renewal of a license or for renewal for a permit shall be handled, investigated and approved or denied within the same time periods as those established in this Article for original license applications and permit applications. In the event a license renewal application or permit renewal application is denied, the applicant shall have all rights of appeal to the City Council as set forth in §11-438 of this Article.

SECTION 7. BE IT FURTHER ORDAINED that Chattanooga City Code, Part II, Section 11-432, be and hereby is amended by deleting subsections (b) and (c) in their entirety and inserting in lieu thereof the following:

(b) Notwithstanding anything herein to the -- contrary, before revoking or suspending any license or permit, the Mayor shall give the license holder or permit holder not less than

ten (10) nor more than twenty (20) days' written notice of the charges against such license holder or permit holder and of the revocation of such license or permit, or of the period of time such license or permit is to be suspended; such notice shall also advise the license holder or permit holder of the license holder's or permit holder's right to request a hearing before the City Council. In the event the license holder or permit holder does not request in writing a hearing before the City Council within the time set forth in such notice, the suspension or revocation shall be effective beginning the date set forth in such notice.

If the license holder or permit holder desires to request a hearing before the city Council to contest the suspension or revocation, such request shall be made in writing to the Clerk of the city Council within ten (10) days of the license holder's or permit holder's receipt of the notification from the Mayor. If the license holder or permit holder timely requests such a hearing, the effective date of a suspension or hearing shall be stayed pending the final outcome of judicial proceedings to determine whether such license or permit has been properly revoked or suspended under the law.

If the license holder or permit holder timely requests such a hearing, a public hearing shall be held within fifteen (15) days of the Clerk's receipt of such request before the city Council at which time the license holder or permit holder may present evidence as to why the suspension or revocation is improper or contrary to the provisions of this Article. The city Council shall hear evidence concerning the basis for such suspension or revocation and shall affirm or reverse the

suspension or revocation at the conclusion of said hearing; any such hearing shall be concluded no later than twenty-two (22) days after the license holder's or permit holder's receipt of notification of the suspension or revocation, unless an extension beyond such time period is requested by the license holder or permit holder and granted by the City Council.

(c) If the City Council affirms the suspension or revocation, the Office of the City Attorney shall institute suit for declaratory judgment in a court of record in Hamilton County, Tennessee, within five (5) days of the date of any such affirmation seeking an immediate judicial determination of whether such license or permit has been properly revoked or suspended under the law.

SECTION 8. BE IT FURTHER ORDAINED that this ordinance shall take effect two weeks from and after its passage as required by law.

PASSED on Third and Final
Reading August 1, 1995.

APPROVED: X DISAPPROVED: ____

DATE: August 2, 1995.

/s/ _____
CHAIRPERSON

/s/ _____
MAYOR

MAYOR